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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and SWIFT & COMPANY,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
and THE CLEVELAND UNION STOCK YARDS COMPANY,
Appellees.

MOTION TO AFFIRM
and
BRIEF IN SUPPORT OF MOTION.

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MOTION TO AFFIRM.

Come now the appellees, The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie ~~Railroad~~ Company, The New York Central Railroad Company and The Cleveland Union Stock Yards Company, and move the court to affirm the decree below in the above entitled cause or, in the alternative, to dismiss the appeal therefrom, for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. (Rules 12(3)

and 7(3, 4) Rules of Practice of the Supreme Court of the United States.)

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Appellees.

BRIEF IN SUPPORT OF MOTION.

The statutory three-judge District Court's Findings of Fact and Conclusions of Law in this case are set out verbatim in the transcript of record. The facts upon which the Court decided this case are not in dispute and appellees contend that the conclusions of law, upon which the order and judgment are based, are so sound and logical in the application of elementary principles that reasonable minds can come to no other conclusion.

JURISDICTION.

The final judgment in this case in the District Court involving an order of the Interstate Commerce Commission is permitted to be taken by direct appeal to the Supreme Court under Sec. 210 of the Judicial Code as amended (Sec. 47a of 28 U. S. C.).

STATUTES INVOLVED.

The particular statutes involved in this case come within the Interstate Commerce Act,—Secs. 1(3a), 1(6), 1(9) and 3(1) of 49 U. S. C., and the Elkins Act, Sec. 2, 49 U. S. C., Sec. 42, which are appended hereto.

BASIC ISSUES.

The Interstate Commerce Commission (hereinafter called the "Commission") had assumed the power and authority

(1) to order the railroad companies, appellees herein, to commit a trespass by ordering them to operate over a certain sidetrack owned by The Cleveland Union Stock Yards Company (hereinafter sometimes called the "Stock Yards Company") and located on its own land, in violation of written contracts in which the Stock Yards Company granted The New York Central Railroad Company (hereinafter called "New York Central"), a common carrier, permission to make limited use of said track in order to reach the plant of Swift & Company, and other industries, and

(2) to deprive the Stock Yards Company of its property by ordering a virtual appropriation of such land and track, without compensation, to the use and benefit of Swift & Company.

With such a patent abuse of the Commission's assumed jurisdiction over basic principles of law summarily disposed of by the District Court's first two Conclusions of Law, the other questions are of relatively minor importance. However, they may be stated as follows:

1. Has the Commission the constitutional power to declare the appropriation of property of Stock Yards Company to the use and benefit of Swift & Company?

2. Has the Commission the power and authority to:

(a) declare that the track constructed and owned by the Stock Yards Company for its benefit and use, and located on its land, is a part of the New York Central System, simply because the Stock Yards Company permitted limited use of said track for the benefit of Swift & Company, and other industries, under the terms of a written contract, which, nevertheless, at all times, consistently, constantly and notoriously, preserved the Stock Yards Company's ownership and control thereover and was terminable on 30 days notice by Stock Yards Company?

(b) enlarge the privileges and burdens of the private sidetrack agreement between Stock Yards Company, a non-carrier corporation, and New York Central, and to order the Stock Yards Company to utterly disregard the provisions of said sidetrack agreement and desist from the practice of asserting or exercising complete ownership of and control over its property?

(c) order Stock Yards Company, which is a non-carrier corporation and which does not operate a railroad "to establish and put in force * * * and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of complainant (Swift & Company) in Cleveland, Ohio, of its interstate shipments of livestock carried over defendant's lines and consigned thereto."?

(d) order the railroad companies, appellees herein (four of which railroads do not have any tracks serving Swift & Company), under provisions of Sec. 1(6) of the Interstate Commerce Act,

> "to establish and put in force * * * and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of complainant (Swift & Company) in Cleveland, Ohio, of its interstate shipments of livestock carried over"

the lines of the railroad companies, appellees herein, and consigned to Swift & Company's plant when said private

sidetrack belonging to the Stock Yards Company (and which, prior to 1938, was used in making delivery of carload shipments of livestock to Swift & Company's plant) is available to the railroad companies, appellees herein, only for the limited use which is permitted under the written agreement between New York Central and Stock Yards Company?

(e) change or modify a valid, existing private sidetrack agreement between the New York Central and Stock Yards Company and penalize the latter by ordering the taking of its property for the benefit of Swift & Company, (which company has not provided its own direct sidetrack connecting with the main line right of way of the New York Central), thereby enabling Swift & Company to receive shipments of livestock which the Stock Yards Company considers to be competitive to its business of operating a livestock market?

(f) Is not the determination of questions 1, 2(a), (b), (c), (d) and (e) within the jurisdiction of the courts under the constitution, and beyond the powers of the Commission?

3. Has the Commission the power and authority to:

(a) declare that the property of the Stock Yards Company was devoted to public use when at all times it (Stock Yards Company) "constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track"?

(b) order a plant delivery service to be rendered to Swift & Company, under the provisions of Sec. 1(9) of the Act, when Swift & Company has not provided and does not have, nor maintain, its own direct sidetrack connection with New York Central's main line right of way, which service, under the provisions of Sec. 3(1) of the Interstate Commerce Act, would amount to a preference over other shippers in similar businesses who have built, and maintain, their own sidetracks connecting directly with the railroad's main line right of way?

(c) lawfully determine that a private sidetrack is part of a railroad system, under the provisions of Sec. 1(3)(a) of the Interstate Commerce Act, where a carrier is granted the use of said private sidetrack only under the terms of a written contract strictly defining the limited uses permitted thereunder?

(d) lawfully order a railroad in the circumstances set up in question 3(c) to commit a trespass by ordering it to continue using said private sidetrack for the benefit of another shipper (Swift & Company) where there is a legal or physical obstacle preventing such use, or to order the carrier or any other party to take steps to remove such obstructions?

4. Does the Interstate Commerce Commission, under the Elkins Act, have the power and authority to order The Cleveland Union Stock Yards Company, a non-carrier corporation, to publish rates and provide a service to Swift & Company, a private corporation, as it did under its order dated May 3, 1946?

ARGUMENT.

The view of the appellees is that the preliminary reports by the Examiners of the Interstate Commerce Commission answered the above questions correctly. Their interpretation of the issues and the solution thereof were affirmed by the statutory three-judge district court, which recognized the elementary principles of law applicable to the foregoing questions. However, the Commission's findings and final report and order entirely ignored and disregarded the elementary principles of law applicable to this controversy, which the statutory three-judge district court held to transcend the jurisdiction of the Commission and accordingly and properly decreed that said report and order be set aside. Reference is therefore made to the Court's Findings of Fact and Conclusions of Law for sound judicial reasoning applicable to this controversy.

A search of the powers granted to the Commission does not disclose the delegation of any power whatsoever to order the appropriation of the property of one person to the use of another; in fact, Sec. 1(22) of the Transportation Act of 1920 provides that the authority of the Commission "shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks located or to be located wholly within one state." Thus, the Commission being without any jurisdiction over the construction or abandonment of this sidetrack under its enabling act, and certainly having no such powers under the common law, it could by no means have any powers to effect any appropriation of property under the guise of requiring service to be rendered to a shipper, under the provisions of Sec. 1(9) of the Interstate Commerce Act, over a private sidetrack owned by another shipper or industry, which owns the land upon which it is constructed and controls the use of said private sidetrack.

In taking an affirmative position with respect to the foregoing questions, the Commission wrongfully assumed power and authority, relying upon certain stated provisions of the Interstate Commerce Act. That such provisions are not applicable to the facts herein is illustrated by the Commission's own interpretation in similar cases before it, by the Supreme Court's decisions on appeals from the Commission's orders, and by certain outstanding state court decisions, to-wit:

Limits Industrial Building Corp. et al. v. B. & O. C. Term. Co., 258 I. C. C. 438, wherein it was said that:

> "Defendant's failure to continue freight service to and from an industry at Cicero, Ill., over certain switching and private industrial tracks previously constructed and in operation, and its refusal to operate over such tracks, under existing circumstances, not shown to be unlawful. Complaint dismissed."

At page 441 of the *Limits* case, the Commission said:

"• • • Common carrier services over private sidings and private industrial tracks can not be expected, and certainly can not be compelled, *where obstructions against the use thereof,* either legal or physical, *not caused by a carrier,* prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier nor any other party, to take steps to remove such obstructions."

Part of the property rights involved in the *Limits Industrial* case is considered in the decision in *Greenlee Foundry Co. vs. Borin Art Products Co.*, 379 Ill. 494, and a reading of this case is helpful in considering the complete picture of the *Limits Industrial* case.

In the *Limits Industrial* case, the B. & O. C. T. switch connected with the spur track of Limits, under an agreement dated April 30, 1937, between the B. & O. C. T. and Limits, Limits regulated the right of use of its spur track by Borin Art Products Co. Limits owned that track beyond the B. & O. C. T. right of way. When the court enjoined the B. & O. C. T. from rendering any service over that track, the complainant sought in the action before the Interstate Commerce Commission to compel the rendering of the service. The B. & O. C. T. was willing to render such service if the legal obstacles were removed, but the Commission held that where there were obstacles against the use of the track, either legal or physical, not caused by the carrier, the carrier can not be expected or compelled to render services over such private sidings and private industrial tracks.

In the present controversy Stock Yards Company is an industry on New York Central and has its own private side track on its own land, and regulates the use of its track by Swift & Company and other industries reached thereby, the same as Limits did in the case under discussion. New York Central is willing to render the service of delivering shipments of livestock to Swift's plant if the restrictions

to the use of Stock Yards track is removed, which is substantially similar to the circumstances in the *Limits* case.

Sholl Bros. v. Peoria and P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529, which is based upon facts almost identical to those in the instant case. In that case Sholl Bros. in 1896 entered into a written agreement with the Peoria & Pekin Union Ry. Co. (hereinafter referred to as the Peoria) whereby the railway agreed to put in a sidetrack from its main track to Sholl Bros.' coal mine about to be opened and operated by them. The contract between Sholl Bros. and the railroad provided that Sholl Bros. should furnish the right of way, grading and bridging from the main track to the mine, do all the grading and bridging necessary for the track at the mine and pay $300.00 as their portion of the first cost of the ties to be used in constructing such sidetrack. The railroad company agreed to furnish the balance of the track material and lay the sidetrack and necessary mine tracks and to maintain such tracks at its own expense, in return for which the railroad company was to have at all times exclusive use of said tracks and right of way. The railroad was also given the right to use said right of way and tracks in handling the business of, or for the purpose of making connections with, any other industry, *except coal mine*, that might thereafter be located adjacent to said right of way, provided said railway company:

> "shall always do such other business in a manner which shall not interfere with Sholl Bros."

There were no industries other than the Sholl Bros.' mine adjacent to, or reached by, this right of way at the time of its construction. However, before the track was laid a site for a state asylum for the insane had been chosen just beyond the land of Sholl Bros., and the asylum was established by the State on that site. The asylum commissioners built railway tracks on the asylum grounds and connected them with the track on Sholl Bros.' land, after which the

track on Sholl Bros.' land was used for the transportation of freight to the asylum.

Sholl Bros. furnished coal to the asylum which was delivered over the track on its land and in some instances coal which was produced at some mine other than Shall Bros.' was delivered to the asylum, but in each case of such delivery the Peoria requested and received the special permission of Sholl Bros. to move this latter coal over the Sholl Bros.' track to the asylum. This practice continued uniformly until 1911 when Peoria issued a tariff showing a rate for the delivery of coal over Sholl Bros.' track to the asylum and announced that such service was open to all persons who might demand it. Thereafter coal from the Wolschlag Co-operative Coal Co., located on Peoria's railroad, was delivered over said track to the asylum. Whereupon Sholl Bros. filed court action and secured an injunction against the transportation over said track and right of way of coal not mined on their lands or under their coal rights.

In the trial Sholl Bros. contended that by the terms of the contract coal mines generally were excepted from the industries whose business the Peoria could handle over this track or make connections with, and that Peoria was precluded by the terms of the contract from transporting any coal over the track except the coal from the mine of Sholl Bros. *The Court sustained this interpretation, not only upon the terms of the contract themselves, which the court found to be somewhat ambiguous, but mainly upon the construction of the parties themselves as shown by their acceptance, acts and other extrinsic circumstances.* The court affirmed judgment for Sholl Bros. upon the following grounds (p. 531):

> "• • • *It must be remembered in this connection that the railway company does not own this right of way.* The fee in the land and right of way is owned by the defendants in error, *and the right of the railway company to*

use the tracks and right of way is restricted to whatever rights it has by the terms of the contract." (Emphasis ours.)

(p. 532):

"* * * *The sidetrack involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway, but not a part of it, and could not become a part of the railway system of plaintiff in error, unless* it be purchased or *acquired by condemnation proceedings.* As hereinbefore pointed out, the right of way on which the track was built is the private property of defendants in error, *and the right of the railway company therein is limited and governed by the provision of the contract that has been considered.*" (Emphasis ours.)

(p. 533):

"It would doubtless be of advantage to the State to be allowed to ship coal over this sidetrack to the asylum, but there is nothing in the circumstances of this case which gives the State any greater rights than an individual would have similarly situated."

Alabama Central R. Co. v. Alabama Public Service Co., 200 Ala. 536, 76 Sou. 862. There the Manchester Sawmill Company (not a party to the action) was a private corporation engaged in the lumber business and owned and operated a logging railroad extending for several miles into a belt of pine timber which it cut into lumber and then transported over said railroad to its mills.

In April, 1915, Alabama Central Railroad Company entered into a contract with the Sawmill Company whereby the railroad acquired the license or right to operate its trains and service over the logging railroad for the purpose of carrying freight and passengers for hire, but it did not acquire the right to haul or transport pine logs or pine lumber of such logging railroad except for its own use. The Sawmill Company retained the paramount right to the use of the track, to the end that it should not be delayed in

the transaction of its own business. It also retained or reserved the right to take up the track or change the location thereof at its will and pleasure and was under no duty to keep the logging railroad in such repair as would be suitable for operating trains thereon. The railroad company had the right under certain conditions to repair and keep up, and under certain other conditions to purchase, the tracks and the rights of the Sawmill Company, as well as to use other property of the Sawmill Company subject to the Sawmill Company's reasonable regulation.

In October, 1916, Aaron and McNeal, a partnership, applied to the Alabama Public Service Commission to require the Alabama Central Railroad to put a sidetrack on the logging railroad of the Sawmill Company for the use of the partnership in transporting pine lumber and other shipments via the railroad. The railroad company was ordered to put in such sidetrack. The Sawmill Company refused to consent to such construction and the railroad filed an action to enjoin enforcement of said order, to which the Public Service Commission demurred and the trial Court sustained its demurrer.

The Alabama Supreme Court held:

> "If it be conceded that the contract * * * is void be reason of the stipulation that the carrier should not haul pine logs or pine lumber over the logging road, or for other reasons, this would not authorize the Public Service Commission to require appellant to violate its void agreement, or to trespass upon, or use without authority, the property of the logging company. * * * Neither the Commission nor the courts have the power to make or alter contracts between parties. * * * but where the carrier does not own or control the track which it uses, but uses the same as a mere licensee, or under an agreement such as is found in this case, the Commission nor the Courts cannot authorize, much less compel, the carrier, thus operating under a mere license, to improve or change the main lines, side tracks, or the loading facilities of the line over which

it is so operating, without right of control, but with the mere right to repair and keep up the lines, as in this case."

* * * * *

"* * * Here, however, the road involved is a private road and not a public one, and those who own, and have the exclusive control of it, are private individuals or corporations, who have merely consented or agreed that appellant, a public service corporation, may use it under certain restrictions and regulations. It may be, as we have said, that this contract or agreement is void, because against public policy; but, if so, it cannot be relieved against by compelling the parties to make a new contract, nor by compelling them to so modify it as to make it legal and binding on both parties."

* * * * *

"* * * appellant not only has no right to do what the Commission has ordered it to do but is under contract or agreement not to do that identical thing; and, should it obey the Commission's order, it would forfeit all right to use any part of the logging road, and be subject to suit for damages by the owners of the road, and if it built the side track voluntarily it would be a trespasser. Unquestionably, the Commission has no power to compel appellant to be a trespasser nor to exempt appellant from liability, should it build the side track, as for a trespass. Nor would the Commission's order to build the side track have the effect to make its construction rightful and lawful."

The Court quoted from *Elliott on Railroads*, Vol. 1 (2d ed.), Sec. 457, substantially to the effect that if the lease were void as against public policy, it neither confers a right nor creates a duty.

The Court further said:

"* * * Here appellant does not own the main line of the logging road, nor even the ties and the rails, much less the right of way, and has no control thereof, except to run its trains thereover, and to repair the same strictly for the purposes and under the rights acquired by its contract. If its contract is valid, it has

agreed not to do what the Commission requires it to do. If its contract is void, it has no right to use the logging road for any purpose, much less to put in or use a side track on the right of way of the logging road. While under the contract it has the option to buy the logging road, the courts cannot compel it to exercise the option. If the facts averred in the bill are true, it would be utterly useless to compel appellant to put in a side track, for the reason that the logging company, who own the land and the road, would not only remove it, but also the main track at that point, and absolutely prevent its use by appellant for the purposes intended by the order."

In *Rex Jellico Coal Co., et al. vs. Louisville & Nashville Ry. Co.*, 237 I. C. C. 67, 70-71, decided January 10, 1940, the Commission held:

"* * * Service over private tracks by a common carrier subject to the Commission's jurisdiction is neither compelled nor prohibited by the Act. To furnish it or withhold it is within the discretion of the carrier, except that in either event the statutory inhibition against unjust discrimination or undue prejudice must be observed." *Winnsboro Granite Corporation vs. Southern Ry. Co.*, 176 I. C. C. 481, 483."

In the *Winnsboro* case the plaintiff contended, as Swift does in this complaint, that the transportation operations over the private track should be regarded as a terminal service similar to that performed to other competing quarries.

In *Alexander King Stone Co. vs. Chicago I. & L. Ry. Co.*, 160 I. C. C. 245, 257, the Commission said:

"* * * The law imposes no duty and confers no right upon a carrier to operate over privately owned tracks without the consent of the owner, and accordingly, no such right could be asserted by a carrier as a condition to the performance of common-carrier duties."

In *Nutile Fruit Co. v. Boston & M. R. Co.*, 155 I. C. C. 221, the Commission held that there was no obligation upon the carrier to deliver upon a particular public delivery track within the juice-grape yards, and characterized the demand of the shipper (which the Commission rejected) in this manner (p. 223):

> "Complainant's reason for alleging that the carrier's failure to place the cars on the designated tracks is an unlawful practice is, apparently, because such placements were specified in its individual contracts of transportation. In short, it is sought to charge the carrier with special contract liability in respect of transportation undertaken under published tariffs. The tariffs called for transportation to Boston and there was, too, the carrier's duty to make reasonable tender of the freight at an accessible point. St. Louis, Mo. (Cupples Station) Terminal Regulations, 40 I. C. C. 425, 432. All this was performed and the only complaint is of failure to perform the further service, alleged to have been specially contracted for, of delivering the cars on the particular tracks designated. The service to which shippers are entitled under published tariffs can not be enlarged by private contract. *Chicago & Alton R. R. Co. vs. Kirby*, 225 U. S. 155. Moreover, it is clear that the right to select the most accessible tracks within a team-track terminal yard is one that could not be made open and available to all shippers, at least not when that yard is being regularly employed, and, accordingly, such right would constitute a special privilege or advantage which the carrier could not lawfully give to an individual shipper."

An important case is *Certain-Teed Products Corp. v. C. R. I. & P. Ry. Co., et al.*, 68 I. C. C. 260, wherein complainant contended that it was the duty of the Rock Island to furnish, as a facility used by it in transporting traffic to and from complainant's plant under through rates, a spur track which extended for about 2000 feet from the complainant's plant, and the plants of two other industries.

adjacent thereto, to the tracks of the Rock Island. This track was built by the Rock Island for a certain plant and under the construction contract the Rock Island agreed to pay $1 per car to the owners of the track if it should use the track for the purpose of transporting thereon the traffic of certain industries. Title to the track was later conveyed to the Chicago, Ottawa & Peoria (hereinafter referred to as the Peoria) which was a small electric common carrier subject to the act and which filed tariffs with the Commission and participated in joint rates on interstate traffic with carriers other than the Rock Island. The Commission stated the issue and its conclusion as follows (pp. 261-263):

"• • • The Rock Island provides the motive power for moving traffic from and to industries on this track. In its tariffs the Rock Island shows complainant's plant as a destination on its own line, and there is no provision that any extra switching charge will be assessed for movement from and to the same. There is no provision in any tariff for the assessing of this $1 charge.

"Complainant contends that the assessment thereof is unlawful under Section 6. It further contends that it is the duty of the Rock Island to furnish this track as a facility used by it in transporting traffic to and from complainant's plant under through rates; that such through rates of the Rock Island, which include service to and from the plant, must be presumed to be adequately compensatory for all services performed; and that the additional charge paid by complainant renders the total charges unreasonable to the extent of $1 per loaded car.

"• • •

"The previous owner of this track did not move any traffic over it, and the relationship that existed between it and the predecessor of complainant was not that of shipper and common carrier. The situation was simply one wherein an owner of a track granted the use thereof to various industries as a means of connecting with the trunk line, and exacted

compensation therefor. The evidence does not indicate that the Peoria's acquisition of the track resulted in any change in the relationship that previously existed between track owner and shipper. The Peoria merely continued as the naked owner of the title to the track, performing no common-carrier service in connection therewith. The fact that the Peoria is a common-carrier corporation subject to the act generally does not operate as a bar to its engaging in lawful business activities other than common carriage. Charges in connection with such activities are not a proper subject of tariff publication. In this connection it should be noted that the Peoria attempted to file a tariff effective April 21, 1921, wherein it provided a charge of $2, to be assessed by it on all loaded cars handled at Marseilles by the Rock Island over the Peoria's tracks. This tariff was rejected by us on the ground that it sought to make a charge for services performed by another carrier. The fact that payment is made per car perhaps makes it savor somewhat of a transportation charge. But this is simply a convenient method of measuring the amount to be paid by complainant for the use of the track. The nature of the transaction is the same as if the amount were fixed at a certain sum per annum.

"The contention that the track in question is a facility of the Rock Island which it is the duty of that carrier to furnish, is equally untenable. *There is no duty on the part of a common carrier subject to the act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line, the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of Section 1 makes it the duty of a common carrier under stated circumstances to construct, maintain, and operate, upon reasonable terms, switch connections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce. But this duty does not arise until the shipper has provided the side track. Ralston Townsite Co. vs. M. P. Ry. Co.*, 22 I. C. C. 354. In the instant case complainant's predecessor and concerns

similarly located, instead of constructing their own switch tracks up to the Rock Island right of way, elected to enter into an agreement with a third party for the privilege of being served by a then existing track, to which arrangement complainant has succeeded. It is true, as previously indicated, that the Rock Island has moved certain building materials over this track to the interchange with the Peoria destined to a consignee at a point beyond Marseilles. This is a temporary arrangement, the details of which are not clearly shown. It cannot be said to change in any way the character of this track with relation to complainant. The amount of consideration that complainant pays for the use of this track is a matter of private contract.

"Complainant's allegations of undue prejudice and unjust discrimination are founded upon the fact that industries at other points receive and ship their traffic at the flat rates applicable from and to the particular point, and are not required to pay the additional trackage charge; but *there is no evidence to show that industries located at such points operate under trackage arrangements similar to those existing between complainant and the Peoria.* (Emphasis ours.)

"We find that the collection of the charge assailed does not constitute a violation of the Interstate Commerce Act, and that we are without jurisdiction to determine the reasonableness of this charge. The complaint will be dismissed."

Again in *Fort Worth Stockyards Co. vs. Brown,* 161 S. W. (2d) 549, the Stockyards Company sought to enjoin defendants from using its land. Stockyards had constructed an alley or driveway leading south from a public street to its pens. Defendants bought livestock from drivers on their way to plaintiff's pens, resulting in traffic congestion and loss of revenue to plaintiff. Defendants contended that the alley or driveway was a public thoroughfare and had been constantly so used by the general public with the knowledge and consent of plaintiff

for more than thirty years. The injunction was denied and plaintiff appealed. The court held:

> (Page 553) "* * * They (defendants) were never more than permittees * * *. Granting to defendants all the rights they may have acquired as such permittees on the premises, the permission given by plaintiff, either expressed or implied, was subject to plaintiff's revocation at its option. * * * to create such a prescriptive right the public use must be exclusive of the private uses of the owner. * * * Use, with permission of the owner, will never ripen into prescription * * *."

The court further held plaintiff's acquiescence in defendant's use of its land would not preclude plaintiff from determining who may and who may not transact business on its premises, this being true even though plaintiff's business is of a public nature. Judgment for plaintiff.

U. S. and I. C. C. vs. Pennsylvania R. Co., 242 U. S. 208, the first syllabus of which reads as follows:

> "1. The Interstate Commerce Commission was given no power to order a carrier to provide and furnish to shippers tank cars for interstate shipments of petroleum products by the amendment of the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, Sec. 8563), to the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104), Sec. 1, defining the term 'transportation' as including 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported,' and making it the duty of every carrier subject to the provisions of the Act 'to provide and furnish such transportation upon reasonable request therefor' although by Section 12 as amended by the Act of March 2, 1889 (25 Stat. at L. 858, chap. 382, Comp. Stat. 1913, Sec. 8576), the Commission was authorized and re-

quired to execute and enforce the provisions of the act, and by Section 13, as amended by the Act of June 18, 1910 (36 Stat. at L. 550, chap. 309, Comp. Stat. 1913, Section 8581), was given power to enter orders not only regarding rates, but regarding classifications, regulations, or practices, whether affecting rates or not. If any duty to furnish such cars exists, it is enforceable in the courts, not by the Commission."

ELKINS ACT.

With respect to the Commission's view that the Stock Yards Company comes within Sec. 2 of the Elkins Act (49 U. S. C. A. 42): The only ground on which the Commission might make an order against said Company is in a situation where it may be included as a party, in addition to a carrier, so far as "rate, regulation or practice under consideration" are concerned. Even if we should concede, which we do not, that the Commission may control the rate, regulation or practice of non-carriers, the Commission clearly has no power to control the use of the privately owned land and tracks of the Stock Yards Company. By attempting to control the use of such property the Commission has ordered an appropriation thereof to the use and benefit of Swift & Company, authority for which assumption of power is not found in the Elkins Act or any other section of the Interstate Commerce Act. In fact such order effecting the appropriation of property without compensation, is a taking without due process and is unconstitutional.

In this connection attention is called to Conclusion of Law IV of the statutory three-judge District Court which clearly sets forth that any order that the Commission may have the power to enter under the Elkins Act must be a lawful order. That the order is unlawful is premised upon the firm belief of the lack of jurisdiction of the Commission over the Stock Yards Company, supported by the Interstate Commerce Act, and decisions thereunder, Sec. 1 of which act is as follows:

"Section 1. Regulation in general; car service; alteration of line. (1) Carriers subject to regulation.—The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *."

The terms, "common carrier" and "railroad," are defined in Section 1 (3) of the Interstate Commerce Act, as follows:

"(3) Definitions.—The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

Certain companies are named as common carriers, but it will be observed that a stock yard company is not specified.

In the case of *Pennsylvania R. Co. v. Public Utilities Com. of Ohio*, 298 U. S. 170, 80 Law. Ed. 1130, the Supreme Court of the United States has stated on page 171 of the former and page 1132 of the latter, that the Interstate Commerce Act is aimed at common carriers. We quote as follows:

"Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commission Act (U. S. C. A. title 49, Sections 1 *et seq.*) is aimed at common carriers exclusively (Sec 1 (1), (3)), and not even at all these. With exceptions plainly unrelated to this case (Sec. 1 (1), (b), (c)), carriers, even though common, are unaffected by the act unless they are carriers wholly by railroad, or if partly by railroad and partly by water, are operated under 'a common control, management, or arrangement for a continuous carriage or shipment.' Sec. 1 (1) (a). Cf. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 S. Ct. 700, 5 Inters. Com. Rep. 391; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 S. Ct. 209; *Standard Oil Co. v. United States* (C. C. A. 2d) 179 F. 614; *Mutual Transit Co. v. United States* (C. C. A. 2d) 178 F. 664. There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any place in the United States.'" (pp. 174, 175)

Under the plain terms of Sections 1 (1) and 1 (3) The Cleveland Union Stock Yards Company is not subject to regulation by the Interstate Commerce Commission. The above opinion of the Supreme Court clearly confirms this interpretation of those sections.

The Commission entertains some theory that Section 42, title 49 U. S. C., authorizes the decision and the order pursuant thereto, against The Cleveland Union Stock Yards

Company. In this, the Commission has misinterpreted the intendment of that section. Congress never intended that the Commission, under and by virtue of Section 42, could regulate all non-carriers who may be interested in matters before the Commission. However, in the instant case the Commission plainly attempts to regulate The Cleveland Union Stock Yards Company, which Company was a defendant in the proceedings. An order was issued against all defendants, which necessarily included that one. It, with the others, is ordered to cease and desist from refusing to deliver livestock to the plant of Swift & Company. It, with the others, is also ordered to publish and maintain a schedule of charges for such deliveries. Compliance by this plaintiff, in view of the fact that it does not operate a railroad company, is not a common carrier, and has no rolling stock; would be exceedingly difficult; in fact, it would be impossible.

A further reference to show the Commission's lack of jurisdiction over a non-carrier will be found in the case of *Refrigerator Car Mileage Allowances*, 232 I. C. C. p. 276, particularly pages 278-9.

So far as concern the "rate, regulation or practice under consideration," referred to in Sec. 2 of the Elkins Act, see the case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428-9, where it is said:

> "Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much

for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie *without* the realm of the Commission's competence."

See also *Ellis v. I. C. C.*, 237 U. S. 434, at pp. 443-4 where the Court says:

"The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of th cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in Section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc. is to be effected by its control over the railroads that are subject to the act."

CONCLUSION.

The controversy is resolved into the two principal questions with respect to the power and authority of the Commission to order the railroad companies to commit a trespass upon the land of the Stock Yards Company, upon

the one hand, and to order the appropriation of said Stock Yards Company's land for the use and benefit of its competitor, Swift & Company, on the other hand. The further questions involved concern the application of the provisions of the Interstate Commerce Act under which the Commission attempts to justify its assumption of jurisdiction and issuance of the orders here involved; however such orders are clearly not within its powers under that Act or the constitution. The appellees respectfully submit that such orders are beyond the lawful authority of the Commission and are wholly illegal and void as was determined by the findings and judgment of the statutory three-judge district court which should be affirmed without further argument, or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that I served the foregoing Motion to Affirm and Brief in Support of Motion by this day mailing a copy thereof to all counsel for appellants in this case.

Dated August 9, 1947.

ROBERT R. PIERCE,
Counsel for Appellees.

APPENDIX.

Title 49 U. S. Code—

Sec. 1(3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Sec. 1(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or con-

nected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 1(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Sec. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, asso-

ciation, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 42. *Parties included in proceedings to enforce law.* In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, Sec. 2, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)